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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 180

NORMAN SEE,

*Appellant,*

—against—

CITY OF SEATTLE,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

## REPLY BRIEF FOR APPELLANT

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## REPLY BRIEF FOR APPELLANT

This brief is submitted primarily to make clear, contrary to suggestions contained in Appellee's Brief, that Appellant's constitutional right of privacy can be protected without unduly restricting the administrative power of inspection or impeding an effective system of fire prevention.

Appellee's argument is flawed in two major respects. In the first place, it virtually ignores the values embodied in the right of privacy. Secondly, in part because of a misconception of Appellant's argument, it raises a false spectre of conflagration if Appellant's constitutional rights are protected.

1. If this Court accepts Appellee's insistence that private property must be subject to inspection on the mere say-so of an official, an important facet of the right to privacy will be abrogated just at a time when the important personal and social values it protects have been subject to redefinition and expansion by this Court. See the cases discussed in Appellant's Brief, pp. 19-20. This is not to deny the obvious need for administrative power of inspection and enforcement in an increasingly urbanized society. Rather it is to assert that this power of inspection is not an absolute, but that it is qualified by individual rights protected by the Constitution, and that it cannot be permitted to vitiate the individual's interest in the sanctity of his private premises. In short, if an inspector —or a person claiming to be an inspector—automatically can gain entry to private property over the objection of the owner, privacy is reduced to the vanishing point and the right to be free from "unreasonable searches" is read out of the Fourth Amendment.

Consider this very case. There is nothing to show that the inspection was for the purpose of fire prevention, that it was part of a spot check or an area search of general applicability, and certainly nothing to show that Appellant's property posed a fire risk. Indeed, there may have been no valid motive whatever for the inspection. Appellee made no effort to demonstrate the reasonableness of the search conducted in this case. In fact, it concedes that "[n]o facts are in the record before this Court to indicate whether the public officials were reasonable in their approach. . . ." (Br. p. 14.) In effect, appellee asserts an absolute right to search appellant's premises at any time, "as often as may be necessary" in the judgment of the

searching officials. In other words, "[the inspectors] action could have been based on caprice or on personal or political spite. It hardly contradicts experience to suggest that the practical administration of local government in this country can be infected with such motives." *Eaton* v. *Price*, 364 U. S. 263, 271 (1960) (dissenting opinion).

The ordinance from which Appellee derives its claim of right to search contains no limitations on the time or frequency of searches, and it specifically authorizes a search for the purpose, *inter alia*, of uncovering evidence of violation of the ordinances of the city. The prevention of general exploratory searches for evidence of crimes is of course the central purpose of the Fourth Amendment. See, e.g., *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344 (1931).

The essence of Appellant's claim is that there must be *some* recognition of Fourth Amendment limitations and the right of privacy in the administration of fire prevention programs. There must be *some* judicial barrier to the exercise of unchecked discretion by administrative officials seeking to gain admission to private premises. There must be *some* rational means of assuring the private citizen that his property is being opened as part of a rational inquiry of authorized representatives of local government and not for frivolous or even venal motives of inspectors or impostors. And as pointed out in the opinion of Mr. Justice Brennan in *Eaton* v. *Price*, *supra* at 272, the time for an official seeking entry to make an independent justification is not in a criminal proceeding—by which time the individual has acted at his peril—but in advance of prosecution before a magistrate empowered to issue warrants. This is the practice in England, see *Eaton* v. *Price*,

*supra* at 272, and it reflects an approach that will protect the right of privacy without stultifying regulation of the public health and safety.

2. Appellee's Brief contains numerous references to the supposed dire consequences that will follow reversal of the decision below. For example, at pages 17-18, Appellee states:

> The upholding of Appellant's claim means the complete nullification of Seattle's fire prevention program as to Appellant's warehouse. Under the stipulated facts no Fourth Amendment warrant can issue. Thus no inspection can be made.
>
> This means that Appellant's warehouse could secretly contain the 'dangerous' and 'hazardous' 'conditions or materials' specified in Section 8.01.060 of the Ordinance and nothing can be done to protect Appellant's employees, firemen, neighbors and the public.

This incendiary claim is without substance. In the first place, available empirical data reveals that very few persons object to official searches. See *Frank* v. *Maryland*, *supra* at 372, 383-384. Thus the requirement of a warrant in a rare instance can hardly be said to be disruptive of the administrative program. The enforcement of health and safety codes will not be frustrated. Where considerations of health and safety are involved, there will surely be a different standard of "probable cause" than in the case of criminal investigations. The two situations are simply not comparable, and should be distinguished for constitutional purposes, particularly in view of the fact that the Constitution, by prohibiting "*unreasonable* searches

and seizures" (emphasis added), rejects a mechanical approach indiscriminately applying the concept of probable cause.

Accordingly, a program of area-by-area searches, spot checks, or periodic inspections can be justified without requiring proof of the probable existence of illegal or dangerous conditions. Compare *Frank* v. *Maryland, supra* at 383 (dissenting opinion). Certainly, if there is such proof, or especially an emergency warranting immediate action, a search can properly be made. "The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought." *Ibid.* The critical constitutional requirement is that an unwilling door should not be opened without a showing of some valid administrative need and some regulation of the time and manner of the search. This is a far cry from justifying the conclusion, which permeates Appellee's Brief, that probable cause will be inflexibly adopted from the different setting of the criminal law.

A sensible application of the Fourth Amendment along the lines suggested above should dispose of any fears that tragedy will inevitably follow if this Court provides some procedural protection for the individual right to privacy. Considerations of administrative convenience have never proved the definitive test of a reasonable search under the Fourth Amendment. It is always more convenient for administrative officials to proceed ex parte, without having to justify their actions before a neutral and detached official. Frequently, there have been attempts to limit constitutional rights on these grounds, and just as frequently these have been rejected. See, e.g., *Weeks* v. *United States,* 232 U. S. 384 (1914); *Mapp* v. *Ohio,* 367 U. S. 643 (1961).

Similarly, it is surely off the mark to claim, as does the Appellee here, that an administrative search is "aimed at the saving of life and property" (Br. p. 10) and that the criteria for determining the propriety of such searches "are matters for administrative judgment and such inquiries are not peculiarly judicial in nature" (Br. p. 16). These contentions have forcibly been rejected, again and again, with respect to the criminal law. And certainly it is indefensible to suggest that somehow the Constitution is less solicitous of privacy when the purpose of the search is "administrative." The terse language of Chief Judge Prettyman in *District of Columbia* v. *Little*, 178 F. 2d 13, 17 (1949), aff'd on other grounds, 339 U. S. 1 (1950), puts the matter in proper perspective:

> To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity.*

3. Appellee seeks to support the constitutionality of the Seattle ordinance (Sec. 8.01.050) and the validity of the search conducted pursuant thereto by relying upon a purported constitutional distinction between searches of residences and searches of *private* commercial premises. Appellee's Brief at 11-16. This reading of the Fourth Amendment is in error. Appellee cites no authority for the proposition asserted, and the plain fact is that the Court has specifically refuted this argument. It has recognized that these premises are within the purview of Fourth Amend-

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* See Appellant's Brief at 16-19 for further discussion of this point.

ment protections. In *Lanza* v. *New York*, 370 U. S. 139, 143 (1962), it was stated that a "business office is a protected area [Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920)], and so may be a store [Amos v. United States, 255 U. S. 313 (1921)]." See also cases cited in Brief for Appellant at 11-13.*

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* Several lower courts have similarly held that the constitutional protection against unreasonable searches extends to business premises as well as dwelling houses. See, e.g., *Janney* v. *United States*, 206 F. 2d 601, 603 (4th Cir. 1953); *Martin* v. *United States*, 183 F. 2d 436, 439 (4th Cir.), cert. denied, 340 U. S. 904 (1950); *In re Phoenix Cereal Beverage Co.*, 58 F. 2d 953, 956 (2d Cir. 1932); *United States* v. *Di Corvo*, 37 F. 2d 124, 132-33 (D. Conn. 1927); *State* v. *Cardinale*, 73 N. J. Super. 168, 171, 179 A. 2d 188, 189 (1962).

## CONCLUSION

**The judgment of the Supreme Court of Washington should be reversed and Appellant's conviction vacated.**

Respectfully submitted,

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